

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

No. 1995

BETWEEN:

GLENN ALEXANDER THOMPSON and CHERYL MAREE THOMPSON Plaintiff

and

THE MACEDON RANGES SHIRE COUNCIL

Firstnamed Defendant

and

THE COLIBAN REGIONAL WATER AUTHORITY

Secondnamed Defendant

and

DAVID PARKINSON

Thirdnamed Defendant

and

GRAEME WILSON

Fourthnamed Defendant

INDORSEMENT OF CLAIM PURSUANT TO RULE 5.04(2)(b) OF THE RULES

1. As at 1984 the Plaintiffs were the beneficial owners of certain land within the "Woodleigh Heights Estate" Edgecombe Road, Kyneton in the State of Victoria.

PARTICULARS

The land consisted, inter alia, of lots 1, 2, 7, 10, 12 and 27 on Plan of Cluster Subdivision No. 1134 and being all of the land more particularly described in Certificates of Title Volume 9171 Folios 687, 688, 693, 696, 698 and 713 respectively ("the land").

2. The Firstnamed Defendant:

- (a) is a body corporate duly incorporated pursuant to the provisions of the Local Government Act 1989 (and more particularly pursuant to Order of

the Governor in Council published in the Government Gazette 19.1.95);

- (b) is the successor of the former Council called the "Kyneton Shire Council" ("the KSC");
- (c) is liable for all liabilities of the KSC.

3. The Secondnamed Defendant:

- (a) is a body corporate duly incorporated pursuant to the provisions of the Water Act 1989 (and more particularly pursuant to Order of the Minister for Water Resources published in the Government Gazette 25.3.92);
- (b) as and from 30.3.92 took over the whole of the property, rights, liabilities, obligations, powers and functions of the "Kyneton Water Board" ("the KWB"). The KWB was itself constituted on 1.10.83 by Order of the Governor in Council, published in the Government Gazette 21.9.83. The predecessor of the KWB was the "Kyneton Shire Water Works Trust". As and from 1.10.83, all of the liabilities of the Trust were transferred to the KWB.

4. The Plaintiffs' claims against each of the Defendants is based upon fraudulent misrepresentations and/or negligent misstatements made by the Defendants (and in the case of the First and Secondnamed Defendants, by their predecessors the KSC and the KWB), to the Plaintiffs, during the period 1984 and 1992. The Plaintiffs' said rights of action were concealed from the Plaintiffs by the fraud of the Defendants until on or about 8.8.95. The Plaintiffs did not discover the fraud until on or about 8.8.95.

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5. The claims in fraud and/or negligent misstatement made against the Defendants are constituted by the following:

- (a) as at 1984 the land was mortgaged to the Australian Guarantee Corporation ("AGC"). The Plaintiffs were in default under the mortgage and AGC arranged for a mortgagee sale of the land by public auction. The proposed sale of the land had to be cancelled by the mortgagee. The sole reason for the cancellation of the sale was because of fraudulent or negligent misrepresentations made by the Defendants to the Plaintiffs and to AGC, to the effect that the land did not have, and never had, a right of access to an approved reticulated water supply;
- (b) in 1985 the Plaintiffs attempted to sell the land at public auction. The sale was cancelled by the Plaintiffs. The sole reason for the cancellation of the sale was because of fraudulent or negligent misrepresentations made by the Defendants to the Plaintiffs to the effect that the land did not have, and never had, a right of access to an approved reticulated water supply ("the representations").

PARTICULARS

The representations were made orally and in writing by the Defendants including, representations made by the Thirdnamed Defendant in his capacity as Secretary of both the KSC and the KWB, and also representations made orally by the Fourthnamed Defendant in his capacity as Shire Engineer and Chief Executive Officer of the KSC, to the Firstnamed Plaintiff on 11.11.85 and on various occasions thereafter.

- (c) in the years 1986 and 1987 the Defendants continued to make the representations to the Department of Local Government and the Department of Water Resources;
- (d) during the period 1988 and 1989 the Defendants continued to make the representations to the Plaintiffs;
- (e) the Defendants made the representations fraudulently, and either well knowing that they were false and untrue or recklessly not caring whether they were true or false;
- (f) alternatively to sub-paragraph (e) above:
 - (i) at the time of the making of the representations the Defendants intended and they well knew or ought to have known that the Plaintiffs would rely thereon; and
 - (ii) in the premises the Defendants were under a duty to take care in the making of the representations to the Plaintiffs;
- (g) acting on the faith and truth of the representations, and induced thereby:
 - (i) the Plaintiffs in 1984 communicated with the mortgagee of the land, AGC, in terms that because the land did not have a right of access to an approved reticulated water supply, the proposed auction sale of the land would have to be cancelled; and
 - (ii) the Plaintiffs in 1985 decided that because the land did not have a right of access to an approved reticulated water supply, the proposed auction sale of the land by them would have to be cancelled;
 - (iii) the Plaintiffs thereafter continued to rely upon the representations

and ultimately the mortgagee of the land, MCL Finance Pty Ltd, took possession in 1987 and sold the land on 30.10.89 for \$135,000 on the basis that the land did not have a right of access to an approved reticulated water supply;

- (h) the representations were false and untrue.

PARTICULARS

The representations were false and untrue at the time they were made in that:

- (i) the land was part of Cluster Subdivision No. 1134;
- (ii) Cluster Subdivision No. 1134 had been subdivided pursuant to Planning Permit No. 2191 dated 15.11.78;
- (iii) Provision 6 of Planning Permit No. 2191 required that the Body Corporate of the Subdivision was to be responsible for the proper maintenance of all private facilities including water;
- (iv) Provision 8 of Planning Permit No. 2191 required that the development be carried out in accordance with the Plan and the Submission which formed part of the application for the permit;
- (v) the Submission provided for the construction of a water supply and reticulation system consisting of, inter alia, a lake, high level water tanks, and reticulation pipes;
- (vi) and accordingly, as and from the date upon which the developers (Kenneth Raymond Buchanan and Yvonne Rae Buchanan) were entitled to sell the allotments (October 1979 i.e. the date of registration of the Plan of Subdivision by the Registrar of Titles)

each allotment and/or owner had a right and entitlement to a reticulated water supply;

- (i) the Defendants concealed from the Plaintiffs the falsity of the representations and the Plaintiffs did not become aware of the content of the Plans and the Submission constituting Provision 8 of the Planning Permit 2191, until 8.8.95;
- (j) by reason of the fraud by the Defendants, or alternatively the breach of their duty of care, the Plaintiffs have suffered loss and damage.

PARTICULARS

The Plaintiffs incurred loss being the difference between the value of the land with a right of access to an approved reticulated water supply, and the reduced value of the land if it were without a right of access to an approved reticulated water supply - approximate difference being \$400,000.

The Plaintiffs suffered consequential losses, particulars of which shall be provided.

The Plaintiffs also seek exemplary damages.

Tax payable in relation to any award of damages.

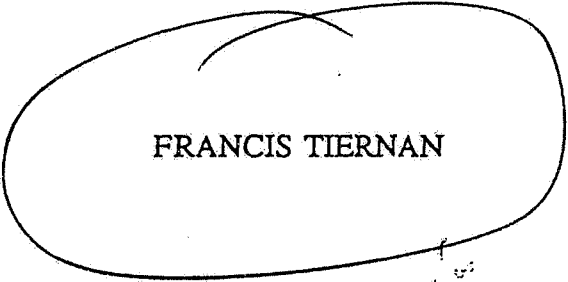
AND THE PLAINTIFFS CLAIM:

- A. Damages.
- B. Tax payable upon the award of damages, or alternatively, an indemnity in respect

of the same.

- C. Interest pursuant to statute.
- D. Costs.
- ✓ E. Such other and further order as the Court deems fit.

DATED: 26TH October 1995.



FRANCIS TIERNAN

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For and on behalf of the Plaintiffs